YONG THAI FOO

v.

SYARIKAT PERNIAGAAN AND PERUSAHAAN MELAYU MUAR BERHAD & THE PEOPLE'S INSURANCE CO. (M) SDN. BHD. (Third Party)

HIGH COURT, JOHOR BAHRU
TUAN RICHARD TALALLA J.
[SUIT NO. 22-15 OF 1989]
20 NOVEMBER 1991

INSURANCE: Civil - Insurance - Workmen's Compensation policy - Undertaking by third party to indemnify defendant any payment made to employees under Workmen's Compensation Ordinance 1952 and at common law - Subject to conditions precedent - Breach - Effect.

The defendant took out a workmen's compensation policy with the third party whereunder for the period specified the third party undertook to indemnify the defendant against all sums the defendant should be liable to pay under the Workmen's Compensation Ordinance 1952 and at common law for personal injury sustained by any of the defendant's employees. The policy was subject to certain conditions, *inter alia*, conditions 4. that the defendant shall give notice as soon as possible of any occurrence which may give rise to a claim and notification of every letter, claim, writ, summons and process etc., 5. that no admission etc. shall be made by or on behalf of the defendant without the consent of the third party which shall be entitled if it so desired to take over and conduct in his name the defence etc. of any claim etc., and 9. that due observance and fulfillment of the terms etc. of the policy shall be conditions precedent to any liability of the third party to make any payment under the policy.

On 25 May 1987 the plaintiff, who was one of the employees of the defendant, sustained injury in an accident giving rise to liability on the part of the defendant. The defendant duly informed the third party of the event.

On 18 January 1989 the plaintiff notified the third party that he had commenced an action against the defendant. By a letter dated 10 February 1989 the third party informed the defendant regarding the claim and that they were to contact the third party's solicitors (the solicitors) immediately upon receipt of any summons, and that a failure to follow instructions would constitute a breach of the conditions of the insurance policy. The solicitors too reminded the defendant to send them any summons or other document received by the defendant. On the same day the solicitors wrote to the plaintiff, saying that they were looking into the matter, but they did not enter appearance.

The plaintiff entered judgment in default of appearance, but this was later ordered to be set aside on the application of the defendant, and the third party ordered to be joined as such. The pleadings between the defendant and the third party were extensive, but in the end it was agreed that the only issues for determination by the Court were to be, first, whether one Mr. Khoo Chi Seng, the managing director of the third party's agent, had made a statement to the effect that the third party would take over the conduct of the proceedings if the default judgment was set aside, and if he had done so, whether that statement was binding on the third party and secondly, whether the solicitors were common solicitors for both the defendant and the third party, and if so, whether on being notified by the plaintiff's solicitors of the commencement of proceedings, they should have entered appearance, or whether the third party should have instructed them to do so; without waiting for further notification from the defendant.

Held:

[1] There was no evidence of the third party having given any assurance to the defendant that they will conduct the proceedings. In any case, there was no evidence of Mr. Khoo having the authority of the third party to give the assurance, and accordingly the third party was not bound by any assurance given in this respect.

[2] At no material time were the solicitors acting for the defendant. The defendant had not appointed them to act for him, and notwithstanding condition 5, he could not have been compelled by the third party to accept the services of the solicitors. Furthermore, the solicitors were entitled to assume, in the circumstances of the case, that the defendant would comply with all the terms and conditions of the policy. There was nothing wrong or improper on the part of the solicitors in what they did or omitted to do.

[3] The defendant was not entitled to indemnity from the third party. As he was in breach of condition 4, which was stipulated to be a condition precedent, the third party was under no liability under the policy. An insured person is required

strictly to meet conditions in a policy which are deemed to be conditions precedent to the insurers' liability thereunder to indemnify.

The third party must be taken to have been prejudiced by the defendant's breach of the policy condition, though where an insurer relies on breach of a condition precedent in the policy, there is no requirement at all to establish prejudice.

[Third party proceedings dismissed with costs to be taxed].

Cases referred to:

*Brook v. Trafalgar Insurance Co. Ltd. [1946] 79 Lloyds Report 365 (**foll**)*

*Chong Kok Hwa v. Taisho Marine & Fire Insurance Co. Ltd. [1977] 1 MLJ 244 at pp. 247, 367 and 368 (**foll**)*

*London Guarantie Co. v. Fearnley [1880] 5 App. Cas. 911 (**foll**)*

*Victorian Stevedoring And General Contracting Co. Ltd. v. Australian Accident Insurance And General Guarantee Co. Ltd. [1893] 19 VLR 139 (**refd**)*

*Farrell v. Federated Employers Ltd. [1970] 3 All ER 632 (**foll**)*

*Lickiss v. Milestone Motor Policies at Lloyds [1966] 2 All ER 972 (**dist**)*

*Deaves & Anor. v. CML Fire and General Insurance Co. Ltd. [1979] ALJR 382 (**refd**)*

*Pioneer Concrete (UK) Ltd. v. National Employers Mutual General Insurance Association Ltd. [1985] 1 Lloyds Law Reports 274 (**refd**)*

Legislation referred to:

Limitation Act 1953

Rules of the High Court 1980, O. 6 r. 7, O. 12 r. 4, O. 18 r. 2

Workmen's Compensation Ordinance 1952

Other source referred to:

McGillivray & Parkington on Insurance Law, 6th Edn., p. 939

For the defendants - K.S. Dass; M/s. K.S. Dass & Partners

For the third party - S.S. Muker; Lovelace & Hastings

JUDGMENT

Richard Talalla J:

The defendant took out a Workmen's Compensation Policy with the Third Party whereunder for a period of insurance from 19 April 1987 to 18 July 1987 the third party undertook to indemnify the defendant against all sums the defendant should be liable to pay under the Workmen's Compensation Ordinance 1952 and amendments thereto and at Common Law for personal injury by accident sustained during the period of insurance by any of the defendant's employees arising in the course of his employment by the insured in the insured's timber business.

There were certain conditions to the Policy of which conditions 4, 5 and 9 as set out hereunder are relevant:

> 4. In the event of any occurrence which may give rise to a claim under this Policy the Insured shall as soon as possible give notice thereof to the Company with full particulars. Every letter claim writ summons and process shall be notified or forwarded to the Company immediately on receipt. Notice shall also be given to the Company immediately the Insured shall have knowledge of any impending prosecution inquest or fatal enquiry in connection with any such occurrence as aforesaid.
>
> 5. No admission, offer, promise or payment shall be made by or on behalf of the Insured without the consent of the Company which shall be entitled if it so desires to take over and conduct in his name the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Company may require.
>
> 9. The due observance and fulfilment of the terms, conditions and endorsements of this Policy so far as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the Proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy.

On 25 May 1987 the plaintiff who was one of the employees of the defendant sustained injury in an accident (the accident) giving rise to liability on the part of the defendant in respect of which the third party would accordingly have had to indemnify the defendant under the terms of the Policy and the defendant duly informed the third party of the event.

On 18 January 1989 the plaintiff's solicitors gave the third party notice that the plaintiff had commenced an action in the High Court, Johore Bahru against the defendant alleging the accident and stating that it was caused by the defendant's negligence in not providing a safe system of work at the defendant's work site where the plaintiff was engaged as a tree feller.

By letter dated 10 February 1989 the third party informed the defendant as follows:

> Re: Accident To Yong Thai Foo on 25 May 1987
>
> We refer to the above matter and are to inform you that we have appointed M/s. V.P. Nathan & Partners, Advocates & Solicitors of 15 (3rd Floor), Jalan Medan Tuanku Satu, Medan Tuanku, 50300 Kuala Lumpur to act for you in respect of a civil claim arising out of the above accident and which is brought against you and your driver by the M/s. Philip Nainan & Co. acting for Yong Thai Foo.
>
> You are hereby instructed to immediately contact our solicitors, M/s. V.P. Nathan & Partners of 15 (3rd Floor), Jalan Medan Tuanku Satu Medan Tuanku, 50300 Kuala Lumpur or ourselves upon receipt of any Summons. Please also instruct your driver to give his utmost co-operation to our Solicitors.
>
> Take Notice, that any failure to follow our instructions and/or failure to extend our Solicitors your co-operation would constitute a breach of the terms and conditions of the insurance policy issued to you by us.
>
> In the event of such breach as aforesaid we shall have no alternative but to repudiate liability and/or to hold you responsible for any damages and costs which might be awarded against you in favour of the claimants by the Court.

As to the second sentence of the second paragraph of this letter it should be stated that there was no question of a driver being involved. On 28 February 1989 M/s. V.P. Nathan & Partners (the solicitors) who had received a copy of the said letter wrote to the defendant as follows:

> Re: Accident to Yong Thai Foo - 25 May 1987
>
> We act for M/s. Peoples Insurance Sdn. Bhd. who have instructed us to act for you in regard to the above.
>
> We are now given to understand that the injured Yong Thai Foo is now pursuing a claim against you under Common Law.
>
> Please note that in the event of you being served with a writ of summons or any other documents you must send the same to us immediately that is to say on the date of receipt.
>
> If you fail to do so our client would not become liable to pay damages as a result of your failure.
>
> Please also let us know if the abovenamed injured was covered under the Employees' Social Security Act 1969 (SOCSO) at the material time of the accident.
>
> Please return to us the enclosed copies of the Warrant to Act duly signed in the space marked "X' in pencil.

On the same day the solicitors wrote to the plaintiff's solicitors saying that they were looking into the matter before advising their clients and denying liability in the meanwhile, but the solicitors did not enter an appearance in the said action.

On 2 March 1989 the plaintiff's solicitors entered judgment in default of appearance in the said action, for damages to be assessed.

On 15 May 1989 the plaintiff's solicitors having then received the default judgment from the Court, wrote to the solicitors, copied to the defendant, forwarding a sealed copy of the default judgment adding that they would be informed of the date fixed for assessment of damages as soon as the Court notified the same.

On 9 June 1989 the plaintiff's solicitors wrote to the solicitors giving notice that damages in the same action would be assessed on 2 July 1989.

On 21 June 1989 the solicitors wrote to the defendant as follows:

> Re: Johor Bahru High Court C. Suit No. 22-15-89
>
> We act for M/s. People's Insurance Co. Sdn. Bhd.
>
> We note that you have failed to forward the Writ of Summons served on you to our client which resulted in Judgment In Default of Appearance being entered against you.
>
> It is a condition of the policy that in the event of you being served with every letter, Claim, Writ of Summons and process shall be notified or forwarded to our client immediately on receipt.
>
> We are further instructed by our client to inform you that you are to engage your own solicitors to deal with the Plaintiff's claim.
>
> Please note that the Notice of Motion dated 1 June 1989 is fixed for hearing on 2 July 1989. A photocopy of the said Notice is enclosed herewith.

The defendant acted accordingly and engaged its own solicitors who took prompt and appropriate steps resulting in the following events. On 26 August 1989 the default judgment was ordered to be set aside and in the same said action the third party was ordered to be and consequently was joined as such. Pleadings were exchanged between the defendant and the third party, the

third party pleading *inter alia* that the solicitors by the letter of 28 February 1989 had requested the defendant to contact them upon receipt of any correspondence from the plaintiff's solicitors and that the defendant failed to do so, whereafter the third party pleaded the gist of the solicitors' letters of 21 June 1989 and 15 July 1989 abovestated. The pleadings were extensive but in the end Counsel for the defendant having conceded that the defendant did not notify or forward the writ of summons to the third party or the solicitors immediately on receipt as required by condition 4 aforesaid, both parties agreed that the only issues for determination by the Court were firstly whether one Mr. Khoo Chi Seng (Mr. Khoo) the managing director of the third party's agent made a statement to the effect that if the default judgment was set aside, the third party could come in and take over the conduct of the proceedings and if he did whether that statement constituted a waiver of the defendant's apparent breach of condition 4. Secondly whether M/s. V.P. Nathan & Partners were common solicitors for both the defendant and the third party, that issue to be determined by recourse to the documents referred to in the proceedings and produced therein, and if so whether on being notified by the plaintiff's solicitors of the commencement of proceedings by the plaintiff, they should immediately have entered an appearance to the writ and defended the action or whether in any event given the circumstances of the case the third party should have instructed the solicitors to enter or the solicitors on their own initiative should have entered an appearance to the writ immediately and without awaiting the defendant's notification or sending of the same on receipt. The third and perhaps most important issue was whether the admitted breach by the defendant of condition 4 of the policy, to wit failure to notify or forward a copy of the writ of summons either to the third party or its solicitor constituted a breach of the condition of the policy such as to render the third party not liable to indemnify the defendant thereunder.

As to the first issue, the chairman of the defendant company one Encik Mustapha testified. He said that when the defendant received the writ he informed the sub-agent of the third party one Tan Boon Cheng (Mr. Tan) from whom he had bought the insurance of the fact and that Mr. Tan told him that if the defendant was successful in getting the default judgment set aside the third party would send its lawyers to represent the defendant. Mr. Tan testified that he contacted Mr. Khoo who told Mr. Tan that if the defendant could set aside the judgment the third party would 'come in'. Mr. Tan went on to testify that before the judgment was set aside he went with Mr. Khoo to the third party's head office in Kuala Lumpur - to find out whether the third party was aware of the accident to the plaintiff. That seemed incredible because at that time the accident was common knowledge to all the parties concerned including the third party. At the head office Mr. Tan said he and Mr. Khoo saw one Mr. Nicholas, that in his presence Mr. Khoo and Mr. Nicholas had a discussion about the plaintiff's claim but that Mr. Tan did not know what was discussed, that Mr. Khoo did not tell him nor did Mr. Khoo tell him the result of the visit. Again this struck me as incredible. Mr. Tan spoke English, in fact he testified in English, and should and would have known every effective thing that transpired in the discussion, especially when in the next breath, so to speak, of his testimony he said that Mr. Khoo and he told Mr. Nicholas to try his best to solve the matter and that the latter said that he would have to refer to his senior officer because he could not do anything. Mr. Tan further testified that on that day neither he nor Mr. Khoo asked to see Mr. Nicholas' superior. Far more credible, to my mind, was Mr. Tan's evidence that when Encik Mustapha showed him the letter of repudiation of liability from the solicitors and asked him whether the third party would be responsible for the case or not, he in consequence with his father and Mr. Khoo went to the head office to ask whether the third party would take this case, and that is when he met Mr. Nicholas. Finally to cap the lid Mr. Tan was questioned and he answered, as follows:

> Q. In fact when you showed that letter of 21 June 1989, Mr. Khoo told you that he could not do anything about it and suggested that you, Mr. Khoo and Mr. Tan go to the head office in Kuala Lumpur and discuss it.
>
> A. Yes, Mr. Khoo said that he and I should go to head office in Kuala Lumpur and discuss it. As a result of the suggestion Mr. Khoo, my Dad and I went to Kuala Lumpur and there saw Mr. Nicholas.

The exchanges took place in cross-examination. In re-examination Mr. Tan said after they had been to the head office, Mr. Khoo told him in a phone call that if judgment was set aside the third party would come in. Mr. Nicholas gave evidence for the third party. He confirmed the meeting at the head office and said that he advised that it

would be in the interest of the defendant to set aside the judgment so that the defendant could negotiate with the plaintiff's solicitor on the aspect of liability and quantum. He went on to testify that Mr. Tan requested him to help and that he, Mr. Nicholas told them to request the defendant to write to the third party and appeal to them to consider taking over the conduct of the case and that he was not in the position to decide the matter. I accepted the testimony of Mr. Nicholas. There was no evidence that Mr. Nicholas had the authority of the third party to say otherwise so that even if he said so, his assurance would not have bound the third party. There was no evidence of the third party giving such assurance at any time. If the third party did give the assurance, I find that they did not, there was no reason for them to renege because the circumstances remained the same throughout. If, for example, there was a change of circumstances giving rise to a situation more adverse to the third party, a change of attitude and an attempt to back out of such a promise could be understood. Mr. Khoo also testified on behalf of the defence. He claimed that he did not tell Mr. Tan that if the judgment could be set aside may be the third party would take over the conduct of the case. He testified that he only informed Mr. Tan that they could go to Kuala Lumpur to discuss. Thus there was a direct conflict in the evidence of Mr. Tan and Mr. Khoo. Mr. Khoo did not strike me as being a truthful witness compared to Mr. Tan in this regard. I find that he did tell Mr. Tan or at least gave him cause to believe as being likely that if the judgment was set aside the third party would assume liability under the policy. Obviously nothing was forthcoming from the third party, so they all went in delegation to the head office to plead the defendant's cause, evidently without success. I do not believe Mr. Tan if he meant to say that after the meeting in the head office Mr. Khoo repeated the assurance categorically. Even if Mr. Khoo did, I find no evidence pointing to Mr. Khoo having the authority express, implied or ostensible of the third party to give the assurance and accordingly, as in the case of Mr. Nicholas, the third party was not bound by any assurance given in this respect. I am supported in this regard by the case of *Brook v. Trafalgar Insurance Co. Ltd.* [1946] 79 Lloyds Report 365 and two passages in the judgment of Scott LJ at pp. 367 and 368 which were accepted by Ajaib Singh J., as he then was, in *Chong Kok Hwa v. Taisho Marine & Fire Insurance Co. Ltd.* [1977] 1 MLJ 244 at p. 247.

As to the question whether the solicitors concerned were common solicitors, I find that if in fact they had been appointed by the defendant to act for them then indeed they would have had a duty to act reasonably in the best interest of both the defendant and the third party in all matters where the defendant and the third party had a common interest as in this instance. It is clear from the evidence and the correspondence set out above that whilst the solicitors had been appointed by the third party to act and did act for them, the defendant did not appoint the solicitors to act for the defendant. In their letter dated 28 February 1989 set out above the solicitors enclosed copies of a Warrant to Act and requested the defendant to sign them but the defendant did not do so. In the event I find that at no material time were the solicitors acting for the defendant. Notwithstanding condition 5, set out above, it would appear that the third party could not compel the defendant to accept the services of the solicitors. See McGillivray & Parkington on Insurance Law, sixth edition, p. 939 and the footnote thereto. I find that the solicitors were entitled to assume that the defendant would comply with all the terms and conditions of the policy especially after being reminded of its obligations thereunder and warned of the consequences of not meeting those obligations, see the letters abovestated. That being the case, it seemed to me reasonable that the solicitors should have awaited receipt of the writ or notification or sending of the same together with the authority to act before entering an appearance to the writ on behalf of the defendant. I found nothing wrong or improper on the part of the solicitors in what they did or omitted to do.

Turning to the admitted breach by the defendant of condition 4 of the policy, it is stated unequivocally in the policy, see condition 9, that the due observance and fulfilment of the terms, conditions and endorsements of this policy so far as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this policy.

In *London Guarantie Co. v. Fearnley* [1880] 5 App. Cas. 911, it was decided that where a condition in a policy is stipulated to be a condition precedent, as in this case, the insurer is under no liability under the policy unless that condition is complied with. In *Victorian Stevedoring And General Contracting Co. Ltd. v. Australian Accident*

Insurance And General Guarantee Co. Ltd. [1893] 19 VLR 139, it was argued on behalf of the insured that a condition stipulating a time limit for notifying the insurer of injury should not be regarded as a condition precedent because it was unreasonable to so read it for the insured was not made aware of it and so could not give notice to the insurer within the stipulated time and that it would be a monstrous thing to hold that the policy was void for failure to give notice of something which the insured did not know. In answer the Court held that accident insurance policies contain many harsh conditions, which the insurers no doubt regard as indispensable, and those who accept such contracts on the basis of the conditions must accept the hardship as a part of the contracts and that although the circumstances might render it very hard or even absolutely impossible to give the notice required, still the insured entered into the contract and placed himself under that obligation, and must abide by it. I make no comment on the *dictum*, especially in regard to a requirement to do something impossible, but simply observe how strictly an insured person is required to meet conditions in a policy which are deemed to be conditions precedent to the insurers liability thereunder to indemnify. In *Farrell v. Federated Employers Ltd.* [1970] 3 All ER 632 where Counsel for the insured (upon the judgment being obtained against the insured, the insured in breach of a condition of the policy having failed to give immediate notification on receipt of the writ under which the judgment was obtained) sought to argue that the insurer had not been prejudiced because they could easily have had the judgment set aside and obtained leave to defend, Lord Denning MR at p. 635 said

> That may be. But I do not see why they should be put to that trouble. The plain fact is that the writ was not notified with all reasonable speed. The condition was not fulfilled. The insurers are entitled to rely on it.

The same circumstances apply here and the third party must be taken to have been prejudiced by the defendant's breach of the policy condition.

Counsel for the defendant relied heavily on the case of *Lickiss v. Milestone Motor Policies at Lloyds* [1966] 2 All ER 972. In that case it was a condition of the policy of insurance that the insured should give full particulars in writing to Milestone Motor Policies, London House as soon as possible after the occurrence of any accident, loss or damage and should forward immediately any letter, notice of intended prosecution, writ, summons or process relating thereto. There was also a condition similar to condition 9 of the policy in this case. On 25 May 1964, the insurers wrote to their insured motorcyclist saying they understood that he was involved in an accident on 17 May, as was the fact, attached a claim form and requested him to complete and return it as soon as possible. The insurer's letter crossed a letter from the motor cyclist informing the insurer about the accident and enclosing a letter from the solicitor for the taxicab driver, the other person involved in the accident, and a few days later he returned the claim form duly filled in. It turned out that he also received a notice of intended prosecution from the police. Later he received a summons returnable on 2 July 1964, at the Blackpool Magistrates' Court but he did not forward these to the insurers. In that respect he did not fulfil the said condition. The police, however, had informed the insurers of the proceedings at the said Court and indeed the insurers then wrote to the motorcyclist informing him so and asked him why he had not notified them of those proceedings since they would wish to arrange his defence. There is some doubt as to whether the motorcyclist replied to this letter. However he pleaded guilty to the charge in the proceedings. The taxicab owner claimed in the County Court against the motor cyclist for damages to the taxicab. The motor cyclist claimed to be indemnified by the insurers. The insurers repudiated liability. The County Court Judge held the motor cyclist liable to the taxicab owner, and then had to consider the claim of the motor cyclist against the insurer. The insurer claimed that it was entitled to insist on conducting the defence of the motor cyclist at the Magistrates' Court by their own solicitor. The judge rejected that contention. He said it was contrary to public policy. The insurer took a further point namely that the motor cyclist had not sent to the insurer the notice of intended prosecution or the summons. On this point the County Court judge decided in favour of the insurer. On appeal to the Court of Appeal, Lord Denning MR took a different view saying that it was unnecessary for the motor cyclist to send the documents to the insurer as they had all the relevant facts and that absolved the motor cyclist from doing more and that seeing that they had received the information from the police, it would be a futile thing to require the motor cyclist himself to give them the self-same information. The learned Master of Rolls went on to say that the law never compels a person to do that which is useless and unnecessary. Danckwerts

LJ also agreed but it is significant that the third Judge Salmon LJ had this to say:

> For my part I would have held that there was a clear breach of condition 1 of the policy. This imposed an absolute obligation on the motor cyclist to forward the summons to the insurers when he received it and also to notify them about the intended prosecution.
>
> The observance of that obligation was by condition 13 made a condition precedent to the insurers liability to pay. But for waiver, I should have felt obliged to hold that, although there is absolutely no merit in the defence - indeed, it is somewhat surprising to find insurers of this standing in circumstances such as these taking the point - they were entitled to succeed.

The decision of Lord Denning MR in the *Lickiss* case was not accepted by the High Court of Australia in *Deaves & Anor. v. C.M.L. Fire and General Insurance Co. Ltd.* [1979] ALJR 382. In that case Stephen J. at p. 394 held that the decision of the learned Master of the Rolls did not find support in the Australian authorities and expressed a preference for the judgment of Salmon LJ. Furthermore in *Farrell's* case abovestated at p. 638, Megaw LJ was non committal in reference to the said decision.

In any event the present case is distinguishable from the *Lickiss* case on the facts. In this case, to my mind, there was no question of requiring the insured to provide self-same information or do something which was useless and unnecessary. The insurer was perfectly entitled and acted reasonably, as did their solicitors, to await service of the writ on the insured before taking steps in the face of the plaintiff's action to protect their rights and liabilities. Order 12 r. 4 of the Rules of the High Court 1980 provide for appearance to be entered after service of the writ as does the advice contained on the face of the writ itself. This scheme of events is anticipated in condition 4 of the policy. There was no reason for the third party or the solicitor to believe that the defendant would act in any manner other than a reasonable one and comply with the conditions of the policy, especially after being reminded to do so, not once but twice, with attendent warning of the consequences of failure to comply. There was no explanation by the defendant as to why despite those reminders and warnings the condition was not complied with. The writ was valid for a period of 12 months within which the plaintiff was required to serve it otherwise it would have lapsed, entailing an application for an order for its renewal, see O. 6 r. 7, or causing a new writ to issue whilst all along time under the Limitation Act 1953 would have been running against the plaintiff and in favour of the defendant and the third party. In the circumstances of this case, I did not see that the third party should have been foregoing any rights by causing an appearance to be entered to the writ before service. There would have been an immediate practical disadvantage to the third party and the solicitors acting for them in entering premature appearance. A defence would have had to be filed within 14 days of that event. See O. 18 r. 2. A retainer, instructions and assistance generally from the defendant would have been required and the third party and its solicitors would have been put in the invidious position of having within the limited time to pursue the defendant for the same rather than have the defendant on receipt of the writ notifying or sending the same to the third party and providing all necessary and reasonable assistance to the third party and its solicitors in the common object of defending the plaintiff's claim in the knowledge that the defendant was ominously in the forefront of the plaintiff's claim.

It may be mentioned in passing that there is authority for the proposition that where an insurer relies on breach of a condition precedent in the policy there is indeed no requirement at all to establish prejudice. See *Pioneer Concrete (U.K.) Ltd. v. National Employers Mutual General Insurance Association Ltd.* [1985] 1 Lloyds Law Reports 274.

The defendant mounted a further argument to the effect that the third party had engaged investigators who having looked into the matter had advised that the plaintiff had a legitimate claim. That to my mind was a *non sequitur*. It was not for the investigators to determine the liability of the defendant and the third party but the Court. In any event the investigators in their report to the third party whilst advising that it appeared that policy liability would attach said that the insured's negligence if claimed to have existed would have to be proved.

Lastly this was not a case of the insured being some witless individual totally unmindful of his obligations under the policy but that of a limited liability company the directors of which should have had the business acumen to know and understand the conditions of the policy and the obligations to the third party thereunder, especially after being repeatedly reminded of those

obligations and the consequences of failure to observe the same.

I find the defendant not to be entitled to indemnity from the third party and accordingly the defendant's action against the third party is dismissed with costs to be taxed.